

Hon. Tana Lin

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION**

AMERICAN GNC CORPORATION;

Plaintiff,

v.

NINTENDO CO., LTD., and
NINTENDO OF AMERICA INC.;

Defendant.

Case No. 2:23-cv-00302-TL

STIPULATED PROTECTIVE ORDER

**NOTE ON MOTION CALENDAR:
SEPTEMBER 28, 2023**

1. PURPOSES AND LIMITATIONS

Discovery in this action is likely to involve production of confidential, proprietary, or private information for which special protection may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket protection on all disclosures or responses to discovery, the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles, and it does not presumptively entitle parties to file confidential information under seal.

2. DEFINITIONS

2.1 “CONFIDENTIAL” MATERIAL

“Confidential” material shall include the following documents and tangible things produced or otherwise exchanged:

- (i) information about the producing party’s product development, design, or specifications for products;
- (ii) information the producing party is obligated by law to maintain in confidence;
- (iii) accounting/financial information, books, and records that are not made public;
- (iv) sales information about commercial products that are not made public, including information on pricing and sales volumes;
- (v) customer information and data;
- (vi) business and marketing plans, strategies, analyses, or surveys;
- (vii) information on producing party’s competitors and competitive environment;
- (viii) contracts and agreements or any draft, negotiations, or summaries thereof;
- (ix) information that is subject to the privacy interest of any individual (e.g., medical records, financial information, etc.);
- (x) any document or tangible thing that the producing party believes in good faith includes information not generally known to others and that it would not normally reveal to third parties except in confidence or has undertaken with others to maintain in confidence.

2.2 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” MATERIAL

“Highly Confidential Attorneys’ Eyes Only” material is “CONFIDENTIAL” material that includes extremely commercially sensitive information, disclosure of which to another party or non-party would create a substantial risk of serious harm that could not be avoided by less restrictive means. Such information shall include but is not limited to trade secrets, confidential

1 research and development, any non-public financial, technical, marketing, cost, pricing and
2 revenue information, and any other commercially sensitive trade secret information.

3 2.3 “HIGHLY CONFIDENTIAL – SOURCE CODE” MATERIAL

4 “Highly Confidential Source Code” material is “CONFIDENTIAL” material that includes
5 extremely commercially sensitive computer code and associated comments and revision histories,
6 and technical documents that have substantial portions of code or describe in detail the algorithms
7 or structure of the software, disclosure of which to another party or non-party would create a
8 substantial risk of serious harm that could not be avoided by less restrictive means. For avoidance
9 of doubt, this definition does not include, and the HIGHLY CONFIDENTIAL – SOURCE CODE
10 designation shall not be used for ordinary engineering specifications or firmware or driver code
11 that a party or non-party makes available in uncompiled form to the public.

12 2.4 “Outside Counsel of Record”

13 “Outside Counsel of Record” are attorneys who are not employees of a party to this action
14 but are retained to represent or advise a party to this action and have appeared in this action on
15 behalf of that party or are affiliated with a law firm which has appeared on behalf of that party and
16 their support staff.

17 3. SCOPE

18 The protections conferred by this agreement cover not only “CONFIDENTIAL,”
19 “HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY,” and “HIGHLY CONFIDENTIAL
20 – SOURCE CODE” material (as defined above) (collectively referred to as “Protected Material”),
21 but also (1) any information copied or extracted from Protected Material; (2) all copies, excerpts,
22 summaries, or compilations of Protected Material; and (3) any testimony, conversations, or
23 presentations by parties or their counsel that might reveal Protected Material.

24 However, the protections conferred by this agreement do not cover information that is in
25 the public domain or becomes part of the public domain through trial or otherwise.

26 4. ACCESS TO AND USE OF PROTECTED MATERIAL

1 4.1 Basic Principles. A receiving party may use Protected Material that is disclosed or
2 produced by another party or by a non-party in connection with this case only for prosecuting,
3 defending, or attempting to settle this litigation. Protected Material may be disclosed only to the
4 categories of persons and under the conditions described in this agreement. Protected Material
5 must be stored and maintained by a receiving party at a location and in a secure manner that ensures
6 that access is limited to the persons authorized under this agreement.

7 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered
8 by the court or permitted in writing by the designating party, a receiving party may disclose any
9 “CONFIDENTIAL” material only to:

10 (a) the receiving party’s Outside Counsel of Record in this action, as well as
11 employees of counsel to whom it is reasonably necessary to disclose the information for this
12 litigation;

13 (b) the officers, directors, and employees (including in house counsel) of the
14 receiving party to whom disclosure is reasonably necessary for this litigation and who have signed
15 the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

16 (c) experts and consultants (and their support personnel under paragraph 8.6)
17 to whom disclosure is reasonably necessary for this litigation and who have signed the
18 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

19 (d) the court, court personnel, and court reporters and their staff;

20 (e) copy or imaging services retained by counsel to assist in the duplication of
21 “CONFIDENTIAL” material, provided that counsel for the party retaining the copy or imaging
22 service has a confidentiality agreement in place with the service similar or identical to Exhibit A
23 and instructs the service not to disclose any “CONFIDENTIAL” material to third parties and to
24 immediately return all originals and copies of any “CONFIDENTIAL” material;

25 (f) during their depositions, witnesses in the action to whom disclosure is
26 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”

(Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of transcribed deposition testimony or exhibits to depositions that reveal “CONFIDENTIAL” material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this agreement;

(g) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information; and

(h) any other person the parties agree to in writing.

4.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” Materials. Unless otherwise ordered by the court or permitted in writing by the designating party, a receiving party may disclose any “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” material only to:

(a) the receiving party’s Outside Counsel of Record in this action, as well as employees of counsel to whom it is reasonably necessary to disclose the information for this litigation;

(b) experts and consultants (and their support personnel under paragraph 8.6) to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgement and Agreement to Be Bound” (Exhibit A) and to whom the procedures set forth in paragraph 4.4, below, have been followed;

(c) professional vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A)

(d) the court, court personnel, and court reporters and their staff;

(e) copy or imaging services retained by counsel to assist in the duplication of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” material provided that counsel for the party retaining the copy or imaging service has a confidentiality agreement in place with the service similar or identical to Exhibit A

1 and instructs the service not to disclose any “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
 2 ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” material to third parties and to
 3 immediately return all originals and copies of any “HIGHLY CONFIDENTIAL – ATTORNEYS’
 4 EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” material;

5 (e) the author or recipient of a document containing the information or a
 6 custodian or other person who otherwise possessed or knew the information; and

7 (f) any other person the parties agree to in writing.

8 4.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY
 9 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE
 10 CODE” Material:

11 (a) Unless otherwise ordered by the court or agreed to in writing by the
 12 designating party, a party that seeks to disclose to an expert or consultant any information or item
 13 that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or
 14 “HIGHLY CONFIDENTIAL – SOURCE CODE,” pursuant to paragraph 4.3(b) first must make
 15 a written request to the designating party that (1) identifies what category of information, whether
 16 it is “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY
 17 CONFIDENTIAL – SOURCE CODE,” that the receiving party seeks permission to disclose to the
 18 expert or consultant, (2) sets forth the full name of the expert or consultant and the city and state
 19 of his or her primary residence, (3) attaches a copy of the expert or consultant’s current resume,
 20 (4) sets forth a list of other cases in which the individual has provided a report or testified (at trial
 21 or deposition) within the preceding four years, and (5) sets forth a list of companies that the
 22 individual has been employed by or provided consulting services pertaining to the field of the
 23 invention of the patent(s)-in-suit or the products accused of infringement within the preceding four
 24 years and a brief description of the subject matter of the consultancy or employment.

25 (b) A party that makes a request and provides the information specified in the
 26 preceding respective paragraphs may disclose the subject protected material to the identified expert

1 or consultant unless, within seven (7) days of delivering the request, the party receives a written
2 objection from the designating party. Any such objection must set forth in detail the grounds on
3 which it is based.

4 (c) A party that receives a timely written objection must meet and confer with
5 the designated party to try to resolve the matter by agreement within seven (7) days of the written
6 objection. If no agreement is reached, the party seeking to make the disclosure to the expert or
7 consultant may seek a conference with the Court and, if necessary, file a motion as provided in
8 Local Civil Rule 7 seeking permission from the court. Any such motion must describe the
9 circumstances with specificity, set forth in detail the reasons why the disclosure to the expert or
10 consultant is reasonably necessary, assess the risk of harm that the disclosure would entail, and
11 suggest any additional means that could be used to reduce that risk. In addition, any such motion
12 must be accompanied by a competent declaration describing the parties' efforts to resolve the
13 matter by agreement (i.e., the extent and the content of the meet and confer discussions) and setting
14 forth the reasons advanced by the designating party for its refusal to approve the disclosure.

15 In any such proceeding, the party opposing disclosure to the expert or consultant
16 shall bear the burden of proving that the risk of harm that the disclosure would entail (under the
17 safeguards proposed) outweighs the receiving party's need to disclose the protected material to its
18 expert or consultant.

19 4.5 Filing Protected Material. Before filing Protected Material or discussing or
20 referencing such material in court filings, the filing party shall confer with the designating party,
21 in accordance with Local Civil Rule 5(g)(3)(A), to determine whether the designating party will
22 remove the confidential designation, whether the document can be redacted, or whether a motion
23 to seal or stipulation and proposed order is warranted. During the meet and confer process, the
24 designating party must identify the basis for sealing the specific confidential information at issue,
25 and the filing party shall include this basis in its motion to seal, along with any objection to sealing
26 the information at issue. Local Civil Rule 5(g) sets forth the procedures that must be followed and

1 the standards that will be applied when a party seeks permission from the court to file material
2 under seal. A party who seeks to maintain the confidentiality of its information must satisfy the
3 requirements of Local Civil Rule 5(g)(3)(B), even if it is not the party filing the motion to seal.
4 Failure to satisfy this requirement will result in the motion to seal being denied, in accordance with
5 the strong presumption of public access to the Court's files.

6 5. DESIGNATING PROTECTED MATERIAL

7 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party
8 or non-party that designates information or items for protection under this agreement must take
9 care to limit any such designation to specific material that qualifies under the appropriate
10 standards. The designating party must designate for protection only those parts of material,
11 documents, items, or oral or written communications that qualify, so that other portions of the
12 material, documents, items, or communications for which protection is not warranted are not swept
13 unjustifiably within the ambit of this agreement.

14 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
15 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to
16 unnecessarily encumber or delay the case development process or to impose unnecessary expenses
17 and burdens on other parties) expose the designating party to sanctions.

18 If it comes to a designating party's attention that information or items that it designated for
19 protection do not qualify for protection, the designating party must promptly notify all other parties
20 that it is withdrawing the mistaken designation.

21 5.2 Manner and Timing of Designations. Except as otherwise provided in this
22 agreement (see, *e.g.*, second paragraph of section 5.2(b) below), or as otherwise stipulated or
23 ordered, disclosure or discovery material that qualifies for protection under this agreement must
24 be clearly so designated before or when the material is disclosed or produced.

25 (a) Information in documentary form: (*e.g.*, paper or electronic documents and
26 deposition exhibits, but excluding transcripts of depositions or other pretrial or trial proceedings),

1 the designating party must affix the word “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL –
2 ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE” to each page
3 that contains Protected Material.

4 A party or non-party that makes original documents or materials available for inspection
5 need not designate them for protection until after the inspecting party has indicated which material
6 it would like copied and produced. During the inspection and before the designation, all the
7 materials made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –
8 ATTORNEYS’ EYES ONLY,” or, for source code related materials, “HIGHLY
9 CONFIDENTIAL – SOURCE CODE.” After the inspecting party has identified the documents it
10 wants copied and produced, the producing party must determine which documents, or portions
11 thereof, qualify for protection under this Order. Then, before producing the specified documents,
12 the producing party must affix the appropriate designation in the manner described above.

13 (b) Testimony given in deposition or in other pretrial proceedings: the parties
14 and any participating non-parties must identify on the record, during the deposition or other pretrial
15 proceeding, all protected testimony, without prejudice to their right to so designate other testimony
16 after reviewing the transcript. Any party or non-party may, within fifteen days after receiving the
17 transcript of the deposition or other pretrial proceeding, designate portions of the transcript, or
18 exhibits thereto, as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
19 ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE.” Alternatively, a designating party
20 may specify, at the deposition or up to twenty-one (21) days afterwards if that period is properly
21 invoked, that the entire transcript shall be treated as “CONFIDENTIAL” or “HIGHLY
22 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE
23 CODE.” Any transcript that is prepared before the expiration of a 15-day period for designation
24 shall be treated during that period as if it had been designated “HIGHLY CONFIDENTIAL –
25 ATTORNEYS’ EYES ONLY” in its entirety, and source code material or testimony as “HIGHLY
26 CONFIDENTIAL – SOURCE CODE,” unless otherwise agreed. After the expiration of that

1 period, the transcript shall be treated only as actually designated. If a party or non-party desires to
2 protect confidential information at trial, the issue should be addressed during the pre-trial
3 conference.

4 (c) Other tangible items: the producing party must affix in a prominent place
5 on the exterior of the container or containers in which the information or item is stored the word
6 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or
7 “HIGHLY CONFIDENTIAL – SOURCE CODE”. If only a portion or portions of the information
8 or item warrant protection, the producing party, to the extent practicable, shall identify the
9 protected portion(s).

10 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
11 designate qualified information or items does not, standing alone, waive the designating party’s
12 right to secure protection under this agreement for such material. Upon timely correction of a
13 designation, the receiving party must make reasonable efforts to ensure that the material is treated
14 in accordance with the provisions of this agreement.

15 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

16 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
17 confidentiality at any time. Unless a prompt challenge to a designating party’s confidentiality
18 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
19 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
20 challenge a confidentiality designation by electing not to mount a challenge promptly after the
21 original designation is disclosed.

22 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
23 regarding confidential designations without court involvement. Any motion regarding confidential
24 designations or for a protective order must include a certification, in the motion or in a declaration
25 or affidavit, that the movant has engaged in a good faith meet and confer conference with other
26 affected parties in an effort to resolve the dispute without court action. The certification must list

1 the date, manner, and participants to the conference. A good faith effort to confer requires a face-
2 to-face meeting or a telephone conference.

3 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
4 intervention, the designating party may file and serve a motion to retain confidentiality under Local
5 Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of
6 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those
7 made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on
8 other parties) may expose the challenging party to sanctions. All parties shall continue to maintain
9 the material in question as confidential until the court rules on the challenge.

10 7. PROSECUTION BAR

11 Absent written consent from the producing party, any attorney representing a party,
12 whether in-house or outside counsel, and any person associated with a party and permitted to
13 receive access to technical documents or other technical materials designated as HIGHLY
14 CONFIDENTIAL – ATTORNEYS’ EYES ONLY or HIGHLY CONFIDENTIAL – SOURCE
15 CODE (collectively, “HIGHLY SENSITIVE MATERIAL”), who obtains, receives, has access to,
16 or otherwise learns, in whole or in part, another party’s HIGHLY SENSITIVE MATERIAL under
17 this Order shall not prepare, prosecute, supervise, or assist in the preparation or prosecution of any
18 patent application pertaining to the field of the invention of the patents-in-suit (*e.g.*, motion and
19 position sensing and measurement) as well as the subject matter of the HIGHLY SENSITIVE
20 MATERIAL to which access is received during the pendency of this action and for one year after
21 its conclusion, including any appeals. Notwithstanding the foregoing, an individual that certifies
22 that they no longer have access to HIGHLY SENSITIVE MATERIAL and no longer have access
23 to HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY under this Order and is no longer
24 performing work for the Receiving Party is no longer subject to the prosecution bar, after one year
25 from the date of the certification. To ensure compliance with the purpose of this provision, each
26 party shall create an “Ethical Wall” between those persons with access to HIGHLY SENSITIVE

1 MATERIAL and any individuals who prepare, prosecute, supervise, or assist in the preparation or
2 prosecution of any patent application pertaining to the field of the invention of the patents-in-suit
3 as well as the subject matter of the HIGHLY SENSITIVE MATERIAL to which access is received.
4 Nothing in this Order shall prevent a person with access to HIGHLY SENSITIVE MATERIAL
5 from participating in a PTO proceeding, *e.g.*, EPR, IPR or PGR, except that the person shall not
6 participate, directly or indirectly, in the amendment of any claim(s). Plaintiff confirms that it will
7 not amend any claims of the patents-in-suit, and that the patents-in-suit are expired. For avoidance
8 of doubt, mere access to non-technical (*i.e.*, financial or sales) information will not trigger any bar
9 under this paragraph, even if the information is designated HIGHLY CONFIDENTIAL –
10 ATTORNEYS’ EYES ONLY.

11 8. SOURCE CODE

12 8.1 To the extent production of source code becomes necessary in this case, a producing
13 party may designate source code as “HIGHLY CONFIDENTIAL – SOURCE CODE” in
14 accordance with Paragraph 2.3 above.

15 8.2 Access to a party’s source code material shall be provided only on “stand-alone”
16 computer (that is, the computer may not be linked to any network, including a local area network
17 (“LAN”), an intranet or the Internet). The stand-alone computer may only be located within the
18 continental United States at the Palo Alto or Redwood City offices of the producing party’s outside
19 counsel in Northern California or another mutually agreed upon location. The stand-alone
20 computer shall have disk encryption and be password protected. With the exception of note-taking
21 as described below, any making of electronic or paper copies of any complete lines of source code
22 is prohibited while accessing the computer containing the source code. All persons entering the
23 locked room containing the stand-alone computer must agree to submit to reasonable security
24 measures to ensure they are not carrying any prohibited items before they will be given access to
25 the stand-alone computer, and shall sign a log that includes the names of persons who enter the
26 room and the dates and times when they enter and depart. A non-attorney for the producing party

1 may visually monitor the activities of the receiving party's representatives but only to ensure that
2 no unauthorized electronic records of the source code material and no information concerning the
3 source code material are being created or transmitted in any way.

4 8.3 The receiving party shall make reasonable efforts to restrict its requests for such
5 access to the stand-alone computer to normal business hours, which for purposes of this paragraph
6 shall be 9:00 a.m. through 5:00 p.m. However, upon reasonable notice from the receiving party,
7 the producing party shall make reasonable efforts to accommodate the receiving party's request for
8 access to the stand-alone computer outside of normal business hours. The parties agree to cooperate
9 in good faith such that maintaining the producing party's source code at the offices of its outside
10 counsel shall not unreasonably hinder the receiving party's ability to efficiently and effectively
11 conduct the prosecution or defense of this action.

12 8.4 The producing party shall provide the receiving party with information explaining
13 how to start, log on to, and operate the stand-alone computer in order to access the produced source
14 code material on the stand-alone computer. The stand-alone computer will be equipped with at
15 least one external flat-screen monitor of sufficient size to be comfortably read from, and if
16 requested, an external mouse or keyboard.

17 8.5 The producing party will produce source code material in computer searchable
18 format, adhering as close as possible to the file and path structure in which the code is kept in the
19 ordinary course, on the stand-alone computer as described above. The stand-alone computer shall
20 include Notepad++, Docfetcher, and Catfish, as tools for the review and analysis of source code
21 material. The receiving party's outside counsel and/or experts/consultants may request that
22 commercially available software tools for viewing and searching source code material be installed
23 on the stand-alone computer, provided, however, that (a) the receiving party possesses an
24 appropriate license to such software tools; (b) the producing party approves such software tools;
25 and (c) such other software tools are reasonably necessary for the receiving party to perform its
26 review of the source code material consistent with all of the protections herein. The producing

1 party shall approve reasonable requests for additional commercially available software tools. The
2 receiving party must provide the producing party with the CD, DVD, file path, or Advanced
3 Package Tool package containing such licensed software tool(s) at least six (6) business days in
4 advance of the date upon which the receiving party wishes to have the additional software tools
5 available for use on the stand-alone computer. The producing party shall make reasonable attempts
6 to install the requested software but will not be held responsible for the proper setup, functioning,
7 or support of any software requested by the receiving party. By way of example, the producing
8 party will not compile or debug software for installation.

9 8.6 Access to source code material shall be limited to outside counsel and up to two (2)
10 outside consultants or experts¹ (*i.e.*, not existing employees or affiliates of a party or an affiliate
11 of a party or competitor identified by the producing party with reasonable specificity) retained for
12 the purpose of this litigation and approved to access such protected materials pursuant to paragraph
13 4.4 above. A receiving party may include excerpts of source code material in an expert report (if
14 no more than 10 consecutive lines of code), pleading (if no more than 10 consecutive lines of
15 code), or in a trial exhibit, trial demonstrative, exhibit to a pleading, exhibit to an expert report, or
16 deposition transcript exhibit (collectively, "Source Code Exhibits"), provided that the Source Code
17 Exhibits are appropriately marked under this Order, restricted to those who are entitled to have
18 access to them as specified herein, and, if filed with the Court, filed under seal in accordance with
19 the Court's rules, procedures, and orders.

20 8.7 To the extent portions of source code material are quoted in a Source Code
21 Exhibit, either (1) the entire Source Code Exhibit will be stamped and treated as HIGHLY
22 CONFIDENTIAL - SOURCE CODE or (2) those pages containing quoted Source Code Material
23 will be separately stamped and treated as HIGHLY CONFIDENTIAL - SOURCE CODE.

24 8.8 No electronic copies of source code material shall be made without prior written
25

26 ¹ Each outside consultant or expert may have 1 support person receive access to source code material, provided that such support person accessing the source code material shall be disclosed pursuant to Paragraph 4.4.

1 consent of the producing party, except as necessary to create documents that, pursuant to the
2 Court's rules, procedures, and order, must be filed or served electronically. To the extent portions
3 of source code material are quoted in an electronic copy or image of a document which, pursuant
4 to the Court's rules, procedures, or orders, must be filed or served electronically ("Source Code
5 Exhibit"), either (1) the entire Source Code Exhibit will be stamped and treated as HIGHLY
6 CONFIDENTIAL - SOURCE CODE or (2) those pages containing quoted source code material
7 will be separately stamped and treated as HIGHLY CONFIDENTIAL - SOURCE CODE.
8 The receiving Party may create an electronic copy or image of limited excerpts of no more than
9 25 lines of source code material from Source Code Printouts (*see* Section 8.9 below) as defined
10 below in paragraph (i), only to the extent necessary to create Source Code Exhibits or any drafts
11 of these documents. The receiving party shall only include such excerpts as are reasonably
12 necessary for inclusion in such documents for filing with the Court. Images or copies of source
13 code material shall not be included in correspondence between the parties (references to production
14 numbers shall be used instead) and shall be omitted from pleadings and other papers except to the
15 extent permitted herein. The receiving party may create an electronic image of a selected portion
16 of the source code material only when the electronic file containing such image has been encrypted
17 using commercially reasonable encryption software including password protection, and any
18 documents or drafts thereof that contain such source code material must remain encrypted except
19 as may be required for filing with the Court. The communication and/or disclosure of electronic
20 files containing any portion of source code material shall at all times be limited to individuals who
21 are authorized to see source code material under the provisions of this Protective Order.
22 Additionally, all electronic copies must be labeled "HIGHLY CONFIDENTIAL – SOURCE
23 CODE" and must only be exchanged via secure, encrypted file transfer. If Source Code Exhibits
24 are filed with the Court, they must be filed under seal in accordance with the Court's rules,
25 procedures and orders. Electronic images should not be maintained separate and apart from the
26 filing for which they were created for.

1 8.9 No person shall copy, e-mail, transmit, upload, download, print, photograph or
2 otherwise duplicate any portion of the designated “HIGHLY CONFIDENTIAL – SOURCE
3 CODE” material. The receiving party may request up to four paper copies (“Source Code
4 Printouts”) of limited portions of source code material, but only if and to the extent reasonably
5 necessary for the preparation of court filings, pleadings, expert reports, or other papers, or for
6 deposition or trial. In no event may the receiving party request printouts of more than
7 15 consecutive pages, or an aggregate total of more than 150 pages, of source code from Plaintiff
8 or Defendants during the duration of the case without prior written approval by the producing
9 party, which will not be unreasonably denied. The receiving party shall not request paper copies
10 for the purposes of reviewing the source code other than electronically as set forth above. Using
11 the software available on the source code computer, the receiving party shall create PDFs of the
12 printed copies the receiving party is requesting and save them in a folder on the desktop named
13 “Print Requests” with a subfolder identifying the date of the request. The PDF printouts must
14 include identifying information including the full file path and file name, page number, line
15 numbers, and date. The request for printed source code material shall be served via email request
16 identifying the subfolders of the “Print Requests” folder that the receiving party is requesting.
17 Within three (3) business days of receiving a request for printed source code material, the
18 producing party will provide to the receiving party the requested printed source code material on
19 watermarked or colored paper bearing Bates numbers and the legend “HIGHLY CONFIDENTIAL
20 - SOURCE CODE.” Any challenges to or modifications of the limitations on the amount of source
21 code to be printed may be made pursuant to the dispute resolution procedure and timeframes set
22 forth herein. The receiving party shall have the burden of showing why the additional printed code
23 is necessary to the case and why the necessity of disclosure of this additional code outweighs the
24 highly confidential nature of the source code.

25 8.10 If the receiving party’s outside counsel, consultants, or experts obtain printouts or
26 photocopies of source code material, the receiving party shall ensure that such outside counsel,

1 consultants, or experts keep the printouts or photocopies in a secured locked area in the offices of
2 such outside counsel, consultants, or expert. The receiving party may also temporarily keep the
3 printouts or photocopies at: (i) the Court for any proceedings(s) relating to the source code material,
4 for the dates associated with the proceeding(s); (ii) the sites where any deposition(s) relating to the
5 source code material are taken, for the dates associated with the deposition(s); and (iii) any
6 intermediate location reasonably necessary to transport the printouts or photocopies (*e.g.*, a hotel
7 prior to a Court proceeding or deposition) provided that the Source Code Printouts are kept in a
8 secure manner that ensures access is limited to the persons authorized under this Order.

9 8.11 A producing party's source code material may only be transported by the receiving
10 party at the direction of a person authorized under paragraph 4.4 above to another person authorized
11 under paragraph 4.4 above, on paper via hand carry, Federal Express, or other similarly reliable
12 courier. Source code material may not be transported or transmitted electronically over a network
13 of any kind, including a LAN, an intranet, or the Internet.

14 8.12 During their review of produced Source Code Material, outside counsel and
15 experts may take notes on a dedicated laptop computer with its camera covered or disabled
16 provided by the producing Party in the same room as the stand-alone computer containing Source
17 Code Material. Such notes may not substitute for the printing requests described in this paragraph.
18 The dedicated laptop computer must contain at least Notepad++. The receiving Party's outside
19 counsel, consultants, and experts may take notes on the dedicated laptop computer and save them
20 on an encrypted removable media, such as a thumb drive, that connects to the dedicated laptop
21 computer. The encrypted removable media must be removed from the room containing the stand-
22 alone computer after the notes have been uploaded to/downloaded from the dedicated notetaking
23 laptop computer. The receiving Party's outside counsel, consultants, and experts may take the
24 encrypted removable media with their notes with them at any time. Other electronic devices,
25 including personal cell phones and any input/output device (*e.g.*, USB memory stick, tablet,
26 camera or any camera-enabled device, CD, floppy disk, portable hard drive, laptop, or any device

1 that can access the Internet or any other network or external system, etc.), shall not be permitted
2 in the rooms with the stand-alone computer(s) and connected printer(s).

3 8.13 The reviewer shall not take notes electronically on the “stand-alone” computer
4 containing source code material or any other computer or electronic device (besides the dedicated
5 note-taking laptop computer) while conducting a review.

6 8.14 A list of names of persons who will review source code material on the stand-alone
7 computer will be provided to the producing party in conjunction with any written (including email)
8 notice requesting inspection. Prior to the first inspection of any source code material on the stand-
9 alone computer, the receiving party shall provide five (5) business days’ notice to schedule the
10 initial inspection with the producing party. The receiving party shall provide three (3) business
11 days’ notice in advance of scheduling any additional inspections. Such notice shall include the
12 names and titles for every individual from the receiving party who will attend the inspection. The
13 receiving party may also request a separate nearby location for keeping personal items (*e.g.*,
14 cellphone), which the producing party will make reasonable efforts to accommodate and provide.

15 8.15 All copies of any portion of the Source Code Printouts in whatever form shall be
16 securely destroyed if they are no longer in use. Copies of Source Code Printouts that are marked
17 as deposition exhibits shall not be provided to the Court Reporter or attached to deposition
18 transcripts; rather, the deposition record will identify the exhibit by its production numbers. If a
19 party deposing a witness wishes to refer to Source Code Printouts, such party will provide notice
20 at least one (1) week in advance of any such deposition. The witness will be provided a copy of
21 the complete range of Source Code Printouts by their counsel. Any paper copies used during a
22 deposition provided by the producing party will be retrieved by the producing party at the end of
23 each day, and any such copies provided by the receiving party will be retrieved by the receiving
24 party at the end of each day. In the case of a remote deposition, counsel for the witness will be
25 responsible for providing a copy of the complete range of Source Code Printouts to the witness in
26 advance of any such deposition.

1 9. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
 2 LITIGATION

3 If a party is served with a subpoena or a court order issued in other litigation that compels
 4 disclosure of any information or items designated in this action as “CONFIDENTIAL,” “HIGHLY
 5 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE
 6 CODE,” that party must:

7 (a) promptly notify the designating party in writing and include a copy of the
 8 subpoena or court order;

9 (b) promptly notify in writing the party who caused the subpoena or order to
 10 issue in the other litigation that some or all of the material covered by the subpoena or order is
 11 subject to this agreement. Such notification shall include a copy of this agreement; and

12 (c) cooperate with respect to all reasonable procedures sought to be pursued by
 13 the designating party whose Protected Material may be affected.

14 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

15 If a receiving party learns that, by inadvertence or otherwise, it has disclosed Protected
 16 Material to any person or in any circumstance not authorized under this agreement, the receiving
 17 party must immediately (a) notify in writing the designating party of the unauthorized disclosures,
 18 (b) use its best efforts to retrieve all unauthorized copies of the protected material, (c) inform the
 19 person or persons to whom unauthorized disclosures were made of all the terms of this agreement,
 20 and (d) request that such person or persons execute the “Acknowledgment and Agreement to Be
 21 Bound” that is attached hereto as Exhibit A.

22 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
 23 MATERIAL

24 When a producing party gives notice to receiving parties that certain inadvertently
 25 produced material is subject to a claim of privilege or other protection, the obligations of the
 26 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision

1 is not intended to modify whatever procedure may be established in an e-discovery order or
2 agreement that provides for production without prior privilege review. The parties agree to the
3 entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

4 12. NON TERMINATION AND RETURN OF DOCUMENTS

5 Within 60 days after the termination of this action, including all appeals, each receiving
6 party must return all Protected Material to the producing party, including all copies, extracts and
7 summaries thereof. Alternatively, the parties may agree upon appropriate methods of destruction.

8 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
9 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
10 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work
11 product, even if such materials contain Protected Material.

12 The confidentiality obligations imposed by this agreement shall remain in effect until a
13 designating party agrees otherwise in writing or a court orders otherwise.

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 Dated: September 29, 2023

Presented by,

3 By: /s/ Mark P. Walters

By: /s/ Michael N. Zachary

4 Matthew J. Brigham (*pro hac vice*)

Corey Johanningmeier (*pro hac vice*)

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For Defendants

Nintendo of America Inc. and

Nintendo Co., Ltd.

1 PURSUANT TO STIPULATION, IT IS SO ORDERED

2 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any
3 documents, electronically stored information (ESI) or information, whether inadvertent or
4 otherwise, in this proceeding shall not, for the purposes of this proceeding or any other federal or
5 state proceeding, constitute a waiver by the producing party of any privilege applicable to those
6 documents, including the attorney-client privilege, attorney work-product protection, or any other
7 privilege or protection recognized by law. This Order shall be interpreted to provide the maximum
8 protection allowed by Fed. R. Evid. 502(d). The provisions of Fed. R. Evid. 502(b) do not apply.
9 Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review
10 of documents, ESI or information (including metadata) for relevance, responsiveness and/or
11 segregation of privileged and/or protected information before production. Information produced
12 in discovery that is protected as privileged or work product shall be immediately returned to the
13 producing party.

14
15 DATED: September 29, 2023

16
17 

18 Tana Lin
19 United States District Judge
20
21
22
23
24
25
26

EXHIBIT AACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
 _____ [print or type full address], declare under penalty of
 perjury that I have read in its entirety and understand the Stipulated Protective Order that was
 issued by the United States District Court for the Western District of Washington on [date] in the
 case of *American GNC Corporation v. Nintendo Co., Ltd., et al.*, No. 2:23-cv-00302-TL. I agree
 to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand
 and acknowledge that failure to so comply could expose me to sanctions and punishment in the
 nature of contempt. I solemnly promise that I will not disclose in any manner any information or
 item that is subject to this Stipulated Protective Order to any person or entity except in strict
 compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
 Western District of Washington for the purpose of enforcing the terms of this Stipulated Protective
 Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____